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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. —

THE UNITED STATES, PETITIONER

v.

THE OHIO POWER COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Claims in the above-entitled case.

OPINION BELOW

The opinion of the Court of Claims and the dissenting opinion of Chief Judge Jones (Appendix B, *infra*, pp. 19-22) are reported at 129 F. Supp. 215.

JURISDICTION

The judgment of the Court of Claims was entered on March 30, 1955 (Appendix B, *infra*, pp. 36-37). On June 18, 1955, the Chief Justice extended

the time for filing a petition for certiorari to and including August 12, 1955 (Appendix B, *infra*, p. 37). The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTIONS PRESENTED

1. Whether the War Production Board in issuing necessity certificates for accelerated amortization had authority to certify only part of the cost of a new facility.

2. Assuming the Board had no statutory authority to issue partial certifications, whether it was proper for the Court of Claims to allow the taxpayer to amortize the full cost of the facility, even though the certifying agency had refused to do so.

STATUTES AND REGULATIONS INVOLVED

The statutory provisions involved are Sections 23(t) and 124 of the Internal Revenue Code of 1939, and the Regulations involved are Treasury Regulations 111, Section 29.124-6, all of which are set forth in Appendix A, *infra*, pp. 14-18.

STATEMENT

The taxpayer is a public utility which manufactures and distributes electrical energy. During World War II, as a result of its inability to meet the increasing demands for electricity, it decided to build a new electric generating plant at Brilliant, Ohio, along with a transmission line from this plant to its substation at Canton. This entire construction was known as the "Tidd Project Emergency Facility" and its amortizable cost was

$11,246,256.54. (R. 2-3;[1] Appendix B, *infra,* pp. 19-20.)

Pursuant to Section 124 of the Internal Revenue Code of 1939, which allows the rapid amortization over a period of five years or less of an "emergency facility" which has been certified as necessary in the interest of national defense, the taxpayer applied for a certificate of necessity applicable to the Tidd project. On November 9, 1944, the War Production Board issued Necessity Certificate No. NC-2029, addressed to the Commissioner of Internal Revenue, and stating that the Tidd project facilities were "necessary in the interest of national defense, during the emergency period, up to 35 percent of the cost * * * thereof." (R. 3-4; Appendix B, *infra,* p. 20.) Subsequent inquiry by the taxpayer revealed that this 35 percent certificate was issued "in accordance with the War Production Board policy [applicable] where the facilities sought to be certified were of such a nature as to be presumably useful in post-war operations." (R. 5.) In such cases only the excess cost due to the war emergency (determined by the Board to be 35 percent in the normal case) was certified.

Accordingly, the Commissioner, acting under the statutory mandate permitting rapid amortization for facilities covered by a necessity certificate, allowed the taxpayer to take rapid amortiza-

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[1] "R." references are to the original record on file with this Court.

tion deductions only on the basis of 35 percent of the cost of the Tidd project, leaving the remaining 65 percent subject to the standard depreciation deduction. The taxpayer, on the other hand, contended that it was entitled to rapid amortization deductions on the basis of the full cost of the Tidd project since the statute did not authorize such partial certifications as the War Production Board had issued in this and other cases. (Appendix B, *infra*, p. 20.) Consequently, after filing a timely claim for refund, the taxpayer instituted the present suit in the Court of Claims. (R. 9, 10.) That court, relying completely on its decision in a similar case in 1952, *Wickes Corp.* v. *United States*, 108 F. Supp. 616,[2] gave judgment for the taxpayer in the sum of $5,885,388.22 plus interest. Chief Judge Jones dissented, as he had done in the earlier case. (Appendix B, *infra*, pp. 21-22.)

REASONS FOR GRANTING THE WRIT

1. The crux of the decision below is that the War Production Board exceeded its statutory authority when it issued partial certifications of the kind here involved and that it was required to issue a certificate for 100 percent of the cost of the property. On that issue, the decision below is in direct conflict with *United States Graphite Co.* v. *Sawyer*, 176 F. 2d 868 (C.A. D.C.), affirming, *per curiam*, *United States Graphite Co.* v. *Harriman*, 71 F. Supp. 944, certiorari denied, 339 U.S. 904.

[2] For the Court's convenience this opinion is printed in Appendix B, *infra*, pp. 22-35.

In that case, the United States Graphite Company, which had also received a 35 percent certificate of the type here in issue, sought to compel the Administrator of the Civilian Production Administration—the then certifying officer—to issue a 100 percent certificate, giving as its reason the same ground alleged in the instant case below, to wit, that the certifying officer had no power under the statute to make partial certifications.[3] The District Court refused to issue the writ, stating that the certifying agency had issued the 35 percent certificate in accordance with its statutory discretion. The District Court decision was affirmed *per curiam* by the Court of Appeals for the District of Columbia, with Judge Miller filing a lengthy dissent on the ground that the statute did not give the certifying agency any authority to issue less-than-100 percent necessity certificates.

Subsequently, the Wickes Corporation, which had taken over the operation of the Graphite Company in the course of a corporate merger, raised the same issue again, but this time by way of a tax suit for refund in the Court of Claims. That court, while recognizing (p. 621) that "Substantially the same questions" had been involved in the *Graphite* case, reached the contrary conclusion, expressing its agreement with Judge Miller's dissent rather than with the majority of the Court of Appeals. "In the circumstances [of our disagree-

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[3] There was also another issue in that case which is not now directly relevant.

ment with the District Court and the Court of Appeals of the District of Columbia]", said the Court of Claims (p. 621), "we are, naturally, skeptical of the correctness of our conclusions." Chief Judge Jones dissented. It is the reasoning in this *Wickes* decision of the Court of Claims which was adopted as the basis of the decision below.

It is therefore evident that, while there is a procedural difference between the *Graphite* case on the one hand and the *Wickes* and instant cases on the other, in that the former was a mandamus action while the latter were suits for refund, the decisions are completely irreconcilable in principle. The majority in the *Wickes* case explicitly stated its agreement with Judge Miller's dissent in the *Graphite* case; and Chief Judge Jones, in his dissent in the *Wickes* case, relied completely on the District Court and Court of Appeals majority in the *Graphite* case. Moreover, if, as the Court of Claims concluded, the certifying agency had no power to issue a less-than-100 percent certificate, and the taxpayer were automatically entitled to amortize the full cost once a necessity certificate had issued, then of course it would follow that a writ of mandamus would lie to compel the purely ministerial action of changing the figure on the certificate from 35 percent to 100 percent. Yet the District Court and Court of Appeals for the District of Columbia expressly refused to issue such a writ since they concluded that the certifying agency had acted within its statu-

tory discretion in limiting the certificate to 35 percent.

2. In view of the conflict which existed after the Court of Claims' *Wickes* decision, the Government contemplated filing a petition for certiorari. However, the Internal Revenue Service concluded at that time that the decision did not appear to be one of general importance,[4] and it was consequently decided not to file a petition. Subsequently, as more cases began to appear at the administrative level, the Internal Revenue Service announced that it would not follow the *Wickes* decision since it had no statutory authority to vary the percentage certified to it by the duly designated certifying agency. Rev. Rul. 54-214, 1954-1 Cum. Bull. 298.

Following the decision below, in which a tax refund of more than $5,000,000 is involved, the Internal Revenue Service was requested to undertake a complete survey of the pending cases in order to determine whether the magnitude of the problem warranted its presentation to this Court. This survey has revealed that there are currently

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[4] The Internal Revenue Service informed the Department of Justice that it did not have any claims for refund pending at that time under the World War II statute, and the subsequent statutory provision applicable to years beginning with 1950 (Section 124A of the Internal Revenue Code of 1939, as added by Section 216(a) of the Revenue Act of 1950, c. 994, 64 Stat. 906) contains language (Section 124A(e)(1)) expressly designed to assure that that statute would not receive the construction which has been placed on the prior statute by the Court of Claims in this and the *Wickes* cases.

pending 39 cases involving this same problem, eight of them in the courts, and 31 of them at the administrative level. The total amount of revenue at stake in all cases is approximately $62,000,000, three cases besides the instant one involving amounts in excess of $5,000,000.[5] All in all, approximately 80 percent of the necessity certificates issued by the War Production Board were partial certificates of the type here in issue, and all of these would be invalidated under the decision below.[6] Although, as pointed out in footnote 4, *supra*, the present problem cannot arise under the statutory provisions enacted for years beginning with 1950, in the interest of removing the cloud from all these World War II certificates as well as in view of the large number of pending cases and the very substantial revenue involved, it is urged that this Court review the decision below.

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[5] Of course, some undeterminable portion of this sum would not have been paid in taxes apart from the decision below since the taxpayers holding these partial certificates would normally have been entitled to ordinary depreciation deductions on the uncertified portion of the construction or to a recovery of their investment in some other way. Generally, however, this would have occurred at lower tax rates.

[6] S. Rep. No. 440, Part 2, 80th Cong., 2d Sess., p. 11. For an elaboration of the Board's partial certification policy see the War Production Board memorandum "Criteria for Preparation of Recommendations for Necessity Certificates" of March 8, 1944, which is reproduced in *United States Graphite Co.* v. *Sawyer*, No. 532, October Term, 1949, Record, pp. 81-87. See also S. Rep. No. 440, Part 2, 80th Cong., 2d Sess., p. 11, where the Special Committee Investigating the National Defense Program scored the War and Navy Departments for their failure to use such partial certifications in cases where the plants in question had substantial post-war utility.

3. For purposes of this petition, it is not necessary to review in detail the economic conditions which gave rise to the War Production Board's partial certification policy. Suffice it to say that by summer 1943, the initial purpose of the rapid amortization law—to stimulate private industry's contributions to the defense effort—had been largely fulfilled, and it was therefore decided that a gradual brake on further expansion was desired.[7] Accordingly, the certifying agency began to issue less-than-100 percent necessity certificates, as well as to require that all further construction or expansion of facilities be approved in advance in order to qualify for the amortization privilege.[8]

When dealing with an administrative agency's power to decide a difficult and delicate question such as the extent to which a given facility is necessary in the interest of national defense, it would be natural, in the absence of some specific limitation in the statute, to assume that Congress intended to give the agency the widest discretion in the exercise of its function. In the present statute there not only is no such limitation; there is an express authorization of flexible administration. Thus Section 124(f) (Appendix A, *infra*, pp. 15-16) provides that in computing the adjusted basis of

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[7] See the testimony of Byron D. Woodside, Director of the Business Expansion Office of the Defense Production Administration. 3 House Hearings before Committee on Ways and Means, 82d Cong., 1st Sess., Revenue Revision of 1951, p. 2667.

[8] 8 Fed. Register 13824 (October 5, 1943).

an "emergency facility" for the purposes of determining the annual amortization deductions:

> (1) There shall be included *only so much of* the amount otherwise constituting such adjusted basis as is properly attributable to such construction, reconstruction, erection, installation, or acquisition after December 31, 1939, as either the Secretary of War or the Secretary of the Navy [later the WPB] has certified as necessary in the interest of national defense during the emergency period * * *. [Emphasis added.]

It was this statutory provision which was squarely relied upon by Judge Pine and by the Court of Appeals majority which affirmed him in the *Graphite* case, as well as by Chief Judge Jones dissenting below. Moreover, if there is any ambiguity in the wording of the statute, it is completely dispelled by Section 29.124-6 of the applicable Regulations (Appendix A, *infra*, pp. 16-18) which specifically envisions partial certifications of the type here issued. (See the example of a 50 percent certificate cited in the Regulations.)

The Court of Claims stated in the *Wickes* case (p. 619) that—

> the [War Production] Board's only function was to determine whether or not facilities answered the description of the statute, i.e., were they "necessary in the interest of national defense during the emergency period." Having so determined, any attempt by the Board

to reduce the benefits which Congress granted to the person whose facilities answered the description, was in violation of the statute.

(Appendix B, *infra*, p. 29.) But this statement seems to lose sight of the fact that such a necessity determination is not always susceptible of a "yes" or "no" answer. Particularly when the stimulative purpose of Section 124 is kept in mind, it is apparent that the question to be asked by the certifying agency is not so much "Is or is not this facility necessary in the interest of national defense," but rather "If the facility is necessary at all, *how necessary* is it in light of present economic conditions?" and "How much of the cost of the facility is properly allocable to the necessity of national defense?"[9]

In the *Graphite* and *Wickes* cases the taxpayer also cited some legislative history, referred to in Judge Miller's dissent in the *Graphite* case, which was claimed to show that Congress did not intend the certifying agency to have the discretion in question. It does not seem appropriate at this point to go fully into this subject. However, all that the legislative history shows is that Congress

[9] It must be recalled that in view of the high surtaxes prevailing at the time, a 100 percent amortization certificate meant that the Government was effectively subsidizing 89 to 90 percent of the cost of the facility.

The present case is illustrative. The decision of the Court of Claims adds approximately $7,300,000 to the amortizable basis of this property, and, for the taxable years involved, rapid amortization instead of ordinary depreciation deductions, results in a reduction in taxes of more than $5,000,000.

intended the process of amortizing the certified amount to be automatic, once a necessity certificate had been issued. But this legislative history is of no aid in answering the question here at issue —the agency's power to issue less-than-100 percent certificates. And unless it is held that the agency had no such power, then it is the certified amount of 35 percent, and not an imputed amount of 100 percent, which must be amortized. Certainly it cannot be presumed that Congress intentionally tied the certifying agency's hands so as to confine its discretion in this important determination to an "all or nothing" choice.

All this, of course, merely underscores the undesirability of reviewing, by way of collateral attack in a tax action, policy judgments of a wartime administrative agency, and the fact that Congress undoubtedly never intended that the Commissioner of Internal Revenue should be permitted or required to go behind the necessity certificate issued to him by the duly designated certifying agency. See *Arkansas-Oklahoma Gas Co.* v. *Commissioner*, 201 F. 2d 98, 103 (C.A. 8th); Rev. Rul. 54-214, *supra*.

4. But even if the Court of Claims properly concluded that the certifying agency had no power under the statute to issue less-than-100 percent certificates, it by no means follows that the court itself was authorized to enter judgment as if a 100 percent certificate had been issued in this case. There is nothing in this record to show that the War Production Board, had it been faced with

such a choice under the prevailing economic conditions, would have issued a 100 percent certificate to the taxpayer rather than none at all. In any event, Congress undoubtedly intended the Board and not the courts to weigh the relevant factors, and it was improper for the court below to "exercise an essentially administrative function." *F. P. C.* v. *Idaho Power Co.*, 344 U.S. 17, 21. "[T]he guiding principle, violated here, is that the function of the reviewing court ends when an error of law is laid bare." *Id.*, p. 20; see also *Phelps Dodge Corp.* v. *Labor Board*, 313 U.S. 177, 194.

CONCLUSION

The Court of Claims has made an erroneously restrictive interpretation of Section 124 of the Internal Revenue Code of 1939, in conflict with that rendered by the Court of Appeals for the District of Columbia. The problem is an important one affecting a large number of currently pending cases and involving a very sizeable amount of revenue. The petition for a writ of certiorari should be granted.

Respectfully submitted,

SIMON E. SOBELOFF,
Solicitor General.
H. BRIAN HOLLAND,
Assistant Attorney General.
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Attorneys.

AUGUST, 1955.

APPENDIX A

Internal Revenue Code of 1939:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * *

(t) [as added by Sec. 301, Second Revenue Act of 1940, c. 757, 54 Stat. 974] *Amortization Deduction.*—The deduction for amortization provided in section 124.

(26 U.S.C. 1952 ed., Sec. 23.)

SEC. 124 [as added by Sec. 302, Second Revenue Act of 1940, *supra*]. AMORTIZATION DEDUCTION.

(a) [as amended by Sec. 155(a), Revenue Act of 1942, c. 619, 56 Stat. 798] *General Rule.*—Every person, at his election, shall be entitled to a deduction with respect to the amortization of the adjusted basis (for determining gain) of any emergency facility (as defined in subsection (e)), based on a period of sixty months. Such amortization deduction shall be an amount, with respect to each month of such period within the taxable year, equal to the adjusted basis of the facility at the end of such month divided by the number of months (including the month for which the deduction is computed) remaining in the

period. Such adjusted basis at the end of the month shall be computed without regard to the amortization deduction for such month. The amortization deduction above provided with respect to any month shall, except to the extent provided in subsection (g) of this section, be in lieu of the deduction with respect to such facility for such month provided by section 23(l), relating to exhaustion, wear and tear, and obsolescence. The sixty-month period shall begin as to any emergency facility, at the election of the taxpayer, with the month following the month in which the facility was completed or acquired, or with the succeeding taxable year.

* * * * *

(e) [as amended by Sec. 155(d) of the Revenue Act of 1942, *supra*] *Definitions.*—

(1) *Emergency Facility.*—As used in this section, the term "emergency facility" means any facility, land, building, machinery, or equipment, or part thereof, the construction, reconstruction, erection, installation, or acquisition of which was completed after December 31, 1939, and with respect to which a certificate under subsection (f) has been made. * * *

* * * * *

(f) [as amended by Sec. 155 (e), Revenue Act of 1942, *supra*] *Determination of Ad-*

justed Basis of Emergency Facility.—In determining, for the purposes of subsection (a) or subsection (h), the adjusted basis of an emergency facility—

(1) There shall be included only so much of the amount otherwise constituting such adjusted basis as is properly attributable to such construction, reconstruction, erection, installation, or acquisition after December 31, 1939, as either the Secretary of War or the Secretary of the Navy has certified as necessary in the interest of national defense during the emergency period, which certification shall be under such regulations as may be prescribed from time to time by the Secretary of War and the Secretary of the Navy, with the approval of the President.

* * * * *

(26 U.S.C. 1952 ed., Sec. 124.)

Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939:

SEC. 29.124-6 [as amended by T. D. 5432, 1945 Cum. Bull. 180]. *Adjusted basis of emergency facility.*—

(a) *In general.*—The adjusted basis of an emergency facility for purposes of computing the amortization deduction may differ from what would otherwise constitute the adjusted basis of such emergency facility, in that it shall

be the adjusted basis for determining gain (see section 113) and in that it may be only a portion of what would otherwise constitute the adjusted basis. It will be only a portion of such other adjusted basis if only a portion of the basis (unadjusted) is attributable to the certified construction, reconstruction, erection, installation, or acquisition after December 31, 1939. It is therefore necessary first to determine the unadjusted basis of the emergency facility from which the adjusted basis for amortization purposes is derived.

The unadjusted basis for amortization purposes, in cases where the entire construction, reconstruction, erection, installation, or acquisition takes place after December 31, 1939, and such construction, reconstruction, erection, installation, or acquisition is certified in its entirety by the certifying officer as necessary in the interest of national defense during the emergency period, is the same as the unadjusted basis otherwise determined.

In cases where the certifying officer certifies the entire construction, reconstruction, erection, installation, or acquisition after December 31, 1939, as necessary in the interest of national defense during the emergency period, but only a portion of the construction, reconstruction, erection, installation, or acquisition attributable to the facility takes place after December 31, 1939, the unadjusted basis for the purposes of amortization is so much of the

entire unadjusted basis as is attributable to that portion of the construction, reconstruction, erection, installation, or acquisition which took place after December 31, 1939. For example, the X Corporation begins the construction of a facility November 15, 1939, and such facility is completed on April 1, 1940, at a cost of $500,000, of which $300,000 is attributable to construction after December 31, 1939. The certificate of necessity covers the entire construction after December 31, 1939, and the unadjusted basis of the emergency facility for amortization purposes is therefore $300,000. For depreciation of the remaining portion of the cost ($200,000), see section 29.124-7.

If the certifying officer certifies only a portion of the construction, reconstruction, erection, installation, or acquisition after December 31, 1939, then the unadjusted basis for amortization purposes is limited to the amount attributable to such portion of the construction, reconstruction, erection, installation, or acquisition after December 31, 1939. Assuming the same facts as in the example in the preceding paragraph, except that the certificate is to the effect that only 50 percent of the construction after December 31, 1939, is necessary in the interest of national defense during the emergency period, the unadjusted basis for amortization purposes is 50 percent of $300,000, or $150,000.

* * * * *

APPENDIX B

IN THE UNITED STATES COURT OF CLAIMS

No. 218-54

(Decided March 1, 1955)

THE OHIO POWER COMPANY

v.

THE UNITED STATES

Mr. J. Marvin Haynes for the plaintiff. *Messrs. Miller, Haynes, Tyree and Sheppard* were on the brief.

Mr. Homer R. Miller, with whom was *Mr. Assistant Attorney General H. Brian Holland,* for defendant. *Mr. Andrew D. Sharpe* was on the brief.

ON PLAINTIFF'S AND DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT

MADDEN, *Judge,* delivered the opinion of the court:

The plaintiff sues to recover $5,885,388.22 which it claims it overpaid in income and excess profits taxes for the years 1943, 1944 and 1945.

The plaintiff is an Ohio corporation which as a public utility manufactures and sells electrical energy. During World War II the demand upon it for additional service made it necessary for it to expand its facilities. Pursuant to Section 124 of the Internal Revenue Code it filed with the Sec-

retary of War, who was then the proper certifying authority, an application for a Necessity Certificate with respect to the construction of a new plant, and a transmission line from the new plant to one of its substations 55 miles away. The plaintiff claimed a cost of $11,246,256.54 for purposes of amortization.

The authority to grant Necessity Certificates was, in December 1943, transferred to the Chairman of the War Production Board, and in October 1945, was again transferred to the Administrator of the Civilian Production Administration. In November 1944, a Necessity Certificate was issued, addressed to the Commissioner of Internal Revenue, and relating to the plaintiff's new construction. It certified that the facilities were necessary in the interest of national defense during the emergency period, up to 35 percent of the cost attributable to the construction thereof. Because of the 35 percent limitation in the Certificate, the Commissioner of Internal Revenue permitted the rapid amortization of only 35 percent of the plaintiff's costs of construction, instead of 100 percent of those costs which, the plaintiff claims, he should have permitted.

In the case of *Wickes Corporation* v. *United States,* 123 C. Cls. 741, we had the same problem. We discussed at length the history and the policy of the statute permitting rapid amortization. We concluded that the attempted 35 percent limitation inserted in the Necessity Certificate in that case

was invalid, as a contradiction of the statute. What we said in that case is applicable to this one.

Defendant's motion for summary judgment is denied and plaintiff's motion is granted.

The plaintiff is entitled to recover, with interest as provided by law. Entry of judgment is suspended to await the filing by the parties of a stipulation showing the amount due.

It is so ordered.

LARAMORE, *Judge;* WHITAKER, *Judge;* and LITTLETON, *Judge,* concur.

JONES, *Chief Judge,* dissenting:

I think the provisions of the Internal Revenue Code clearly authorized the executive officials to limit the amount of rapid amortization deduction.

Section 124 (f) (1) of the Code is as follows:

> (f) Determination of adjusted basis of emergency facility.
>
> In determining, for the purposes of subsection (a) or subsection (h), the adjusted basis of an emergency facility—
>
> (1) There shall be included only so much of the amount otherwise constituting such adjusted basis as is properly attributable to such construction, reconstruction, erection, installation, or acquisition after December 31, 1939, as either the Secretary of War or the Secretary of the Navy has certified as necessary in the interest of national defense during

> the emergency period, which certification shall be under such regulations as may be prescribed from time to time by the Secretary of War and the Secretary of the Navy, with the approval of the President. [26 U.S.C. 124, 1952 Ed.]

Section 124 (f) (3) (C) of the Code provides specifically that no amortization deduction shall be allowed in respect of any emergency facility for any taxable year "unless a certificate in respect thereof under paragraph (1) shall have been made * * *."

Since the statute clearly authorizes the limitation, and the certificate actually limits the amortization to the 35 percent and that amount has been allowed, I would dismiss the petition. *United States Graphite Co.* v. *Harriman*, 71 F. Supp. 944; *United States Graphite Co.* v. *Sawyer*, 176 F. 2d 868 (certiorari denied).

IN THE UNITED STATES COURT OF CLAIMS

No. 50224

(Decided December 2, 1952)

THE WICKES CORPORATION

v.

THE UNITED STATES

Mr. N. Barr Miller for the plaintiff. *Messrs. Haynes & Miller, F. Eberhart Haynes* and *Oscar L. Tyree* were on the briefs.

Mr. John W. Hussey, with whom was *Mr. Assistant Attorney General Charles S. Lyon* for the defendant. *Mr. Andrew D. Sharpe* was on the briefs.

OPINION

MADDEN, *Judge,* delivered the opinion of the court:

The plaintiff seeks to recover from the Government excess profits taxes in the amount of $43,610.29 for the year 1944 and of $93,146.01 for the year 1945. The taxes were paid by The United States Graphite Company. That company was later merged into the plaintiff company, which succeeded to its rights to the claims herein asserted. The instant dispute depends upon the proper interpretation and application of the statutes permitting a corporation which built or expanded its plant or equipment in order to increase wartime production to amortize the cost of such plant or equipment over a short period of years, by deductions from its income for tax purposes.

Section 23 (t) of the Internal Revenue Code provided, during the years here in question, for the deduction from gross income of "the deduction for amortization provided in Section 124." Section 124 is, therefore, the key section in this case. That section, in subsection (a), said that a taxpayer at his election was entitled to a deduction on the basis of the amortization of any emergency facility during a period of sixty months. It referred to

paragraph (e) for the definition of an emergency facility. The first sentence of subsection (e) says:

> As used in this section, the term "Emergency facility" means any facility, land, building, machinery or equipment, or part thereof, the construction, reconstruction, erection, installation or acquisition of which was completed after December 31, 1939, and with the respect to which a certificate under subsection (f) has been made.

Subsection (f) said:

> In determining, for the purposes of subsection (a) or subsection (h) the adjusted basis of an emergency facility (1) There shall be included only so much of the amount otherwise constituting such adjusted basis [1] as is properly attributable to such construction, reconstruction, erection, installation or acquisition after December 31, 1939, as either the Secretary of War or the Secretary of the Navy has certified as necessary in the interest of national defense during the emergency period, which certification shall be under such regulations as may be prescribed from time to time by the Secretary of War and the Secretary of the Navy, with the approval of the President.

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[1] The parties are agreed that the "adjusted basis" of the property here in question was its cost.

For brevity, we refer to the plaintiff's predecessor, The United States Graphite Company, to whose rights the plaintiff has succeeded, as the plaintiff. It was, during the Second World War, engaged in the manufacture of graphitar, which was used by the armed services and the Maritime Commission in the construction of aircraft, ships and other equipment used in the prosecution of the war. In 1943 the Government's demand for graphitar exceeded the capacity of the plaintiff's plant and facilities. Procurement officials encouraged the plaintiff to enlarge its facilities, and the plaintiff, prior to June 27, 1943, made plans to do so. It was granted high priorities for the obtaining of the materials, supplies and equipment needed for the enlargement.

On June 27, 1943, the plaintiff, in order to obtain the benefits of the rapid amortization provided for in Section 124 of the Internal Revenue Code, applied to the Secretary of War for a "necessity certificate" covering its proposed new factory building. That certificate was granted on October 28, 1943, and is not here in question. When the building was under way, the plaintiff applied to the War Production Board for preference ratings or priorities to assist it in obtaining the machinery and equipment for the new plant. These applications were made from October 7 to December 10, 1943, and were promptly granted. The machinery and equipment were obtained by the plaintiff and installed in the factory on various dates between December 28, 1943, and December 15, 1944.

By Executive Orders issued in December 1943, and March 1944, the President transferred to the Chairman of the War Production Board the functions which had formerly been exercised by the Secretary of War and the Secretary of the Navy, with regard to the issuance of necessity certificates. On May 29, 1944, the plaintiff duly filed an application for such a certificate covering machinery and equipment having a total estimated cost of $255,002.79. To the application was appended a list of the items included. On July 17, 1944, the War Production Board advised the plaintiff by letter that it had been determined that the machinery and equipment listed in the plaintiff's application were eligible for tax amortization on a 35% basis, provided that the items were to be acquired after the date of the letter. The Board's letter said that a Certificate of Necessity would be issued, as of July 17, 1944, after the Board had received a schedule in affidavit form stating, with respect to each item, that it had not been acquired before July 17, 1944.

The requested affidavit was filed by the plaintiff on July 27, 1944. It showed, of course, that some of the facilities had been acquired before July 17, 1944, and that the others had been or would be acquired after that date. On or about July 31, 1944, but as of July 17, 1944, the Board issued to the plaintiff a necessity certificate stating that the facilities described in the attached Appendix A were "necessary in the interest of national defense during the emergency period, up to 35% of the

cost" thereof. The attached Appendix A was the list which the plaintiff had submitted with its affidavit. The items thereon shown to have been received before July 17, 1944, were, however, crossed over with Xs made by a red pencil. On April 2, 1946, the Civilian Production Administration, which had, apparently, succeeded to the functions of the War Production Board issued an amendment to the Necessity Certificate, which amendment listed in detail the actual cost of the facilities received before and after July 17, 1944. It showed that the cost of those received before that date was $77,195.99, and of those received after that date was $140,031.44. Those figures were correct, and the present controversy concerns only the application of the amortization law to those amounts.

At the request of the plaintiff for a statement of the reasons for its action, the Civilian Production Administration on August 12, 1946, wrote the plaintiff that it was the Administration's policy, in cases where the facilities to be acquired would be useful in post-war operations, to limit necessity certificates to 35% of the cost of the facilities. The plaintiff had, earlier, been orally advised that the 35% figure had been selected because that was the estimated excess of the cost of the facilities in wartime over what would have been their peacetime cost.

The taxing authorities, in imposing excess profits taxes upon the plaintiff, allowed it to deduct accelerated amortization upon only 35% of the cost of the facilities acquired after July 17, 1944, and no such amortization at all upon those acquired be-

fore that date. The plaintiff contends that it should have been allowed to deduct accelerated amortization upon the full cost of both kinds of facilities.

We consider first the facilities acquired after July 17, 1944. As to those, War Production Board certified that they were eligible for accelerated amortization for tax purposes under Section 124. The plaintiff says that the Board had no power to put the 35% limit on the amount of the cost of the facilities on which amortization should be computed. We agree with the plaintiff. When Congress took the drastic step of conferring the important tax advantage of rapid amortization upon those private enterprises which would invest their own money in expanding their facilities to increase wartime production, it knew that in some cases the enterprises would have, at the end of the war, facilities still useful but which had been paid for, to a considerable extent, by reductions in income and excess profits taxes. See Hearings before the Senate Committee on Finance on the Second Revenue Act of 1940, 76th Cong. 3d Sess. (1940) 124, 125. Yet Congress provided for their amortization over a period of five years. When the War Production Board attempted to limit to 35% the proportion of the cost which could be so amortized, it was, in effect saying that the actual cost could be amortized, during the first five years, only to the degree which would contemplate its total amortization in about fifteen years. That was a contradiction of the statute. The Board, as we have seen, decided upon the 35% figure because that was its estimate of the ex-

cess cost of acquiring the facilities in wartime. But there is no suggestion in the statute or its legislative history that such a consideration had any relevance. The purpose of the statute was to induce private enterprises to acquire facilities for which they would have had no need, except for the pressure of wartime production. According to the Board's reasoning, if price and wage controls had kept the wartime cost of the facilities down to the peacetime cost, no use whatever would have been made of Section 124. But an enterprise does not spend its money to acquire unneeded facilities, or those which will be needed for only a short time, just because it can acquire them at normal prices.

We think that the Board's only function was to determine whether or not facilities answered the description of the statute, i.e., were they "necessary in the interest of national defense during the emergency period." Having so determined, any attempt by the Board to reduce the benefits which Congress granted to the person whose facilities answered the description, was in violation of the statute. The Government suggests that if the Board could not have limited its certificate to 35% of the costs of the facilities, it would, perhaps, not have certified them at all. We have no reason to suppose that the Board, when applied to by the plaintiff for a factual statement as to whether the plaintiff's facilities were, or were not "necessary in the interest of national defense during the emergency period," would have said to itself, "If we make a true statement, it will cost the Government X dol-

lars in lost revenue. If it would cost the Government only Y dollars, we would tell the truth. But since it will cost X dollars, we will not tell the truth."

The Government points to the language of Section 124(f), hereinbefore quoted which says that there shall be included for rapid amortization purposes "only so much of the amount otherwise constituting such adjusted basis as is properly attributable to such construction * * * or acquisition after December 31, 1939, as either the Secretary of War or the Secretary of the Navy has certified as necessary, etc." The Government says that this language authorized the certifying authority to certify only a part of the cost of the facilities, in his discretion. We think that this is a misreading of the statute. Subsection (e) (1) of Section 124, in defining the term "emergency facility" gives a somewhat complicated formula for determining the time at which the facility must have been acquired in order to be eligible for accelerated amortization. Apparently December 31, 1939, was the date after which, in any event, the facility must have been acquired in order to be so eligible. But even if acquired after that date, application for a necessity certificate had to be made within six months after its acquisition. And if some of the facility was acquired more than six months before the date of application, and the rest within six months, the latter amount would be eligible. Thus the words "only so much of, etc." are needed, and have a rational application without construing them as authorizing

the certifying authority to contradict the purpose of the statute.

As to the facilities acquired before July 17, 1944, the problem is somewhat different. It will be remembered that the plaintiff applied for its certificate of necessity on all of its facilities on May 29, 1944. The earliest date at which it had acquired any of the facilities was December 28, 1943, so that its application was within six months of the acquisition. On July 17, 1944, the Board wrote the plaintiff that it had made a determination that all the facilities were necessary in the interest of national defense, provided the date of their acquisition was subsequent to the date of the letter. The Board requested the information, in affidavit form, hereinbefore described, and, having received it, issued its certificate, attaching the entire list, but having crossed out the items which were acquired before July 17, 1944.

The Government points to Section 124 (f) (1) which says that one gets accelerated amortization upon facilities which either the Secretary of War or the Secretary of the Navy has certified as necessary in the interest of national defense. It says that as to the facilities acquired before July 17, 1944, no certificate was issued, and that's the end of it. No certificate, no amortization. Since the Board's letter of July 17 stated that all the facilities listed were necessary, and since the plaintiff's application for its certificate was filed within the six months statutory period, the question arises,

of course, why the Board refused to issue the certificate upon at least the 35% basis.

On March 22, 1944, the Board, with the approval of the President, issued the following regulation (8 Fed. Reg. 2492, March 4, 1944):

> Section 4. *Application must be filed and determination made before construction is begun or date of acquisition.* The construction, reconstruction, erection, installation, or acquisition of a facility will not be deemed necessary within the terms of these regulations unless a determination of necessity is made by the certifying authority prior to the beginning of the construction, reconstruction, erection, installation, or date of acquisition.

The plaintiff contends that the regulation is invalid. When Section 124 was originally enacted, in the Second Revenue Act of 1940, approved October 8, 1940, subsection (f) (3) provided that a certificate of necessity would be ineffective unless obtained before the facility was acquired. By Joint Resolution, approved January 31, 1941, subsection (f) (3) was amended to provide that certificates of necessity would be valid if applications for them were made within sixty days after the acquisition of the facility. Again, in October 1941, by House Joint Resolution 235, Public Law 285, 77th Cong., 1st Sess., Ch. 464, Congress again amended subsection (f) (3) and enlarged the period within which application for a certificate might be filed from sixty days to six months after the acquisition of the facility.

Congress having specifically and repeatedly dealt with the question of when applications might be filed, and having each time enlarged the period, we think that the regulation quoted above, which in effect discarded the amendments made by Congress and put into effect the requirements of the original statute, was invalid. We think, therefore, that the plaintiff having applied within six months for its certificate, it was the duty of the certifying officer to determine the fact as to whether the facilities were necessary in the interest of national defense, and to certify or refuse to certify accordingly. The Chairman of the Board did determine that the facilities were necessary, and issued the letter of July 17 so saying. He then refused to issue the formal certificate solely because of the regulation which we have said above was invalid. He having put his mind upon the question of fact, which we think was his only function under the statute, and having answered that question in favor of the plaintiff, it was his duty to issue the certificate, and we feel certain that he would have done so but for the invalid regulation. His refusal, therefore, amounted in law, though not in fact, to an arbitrary refusal to perform his statutory duty. We have no reason to suppose that the enormous tax benefits which Congress, wisely or not, sought to confer by the enactment of Section 24 were to be bestowed or withheld at the arbitrary will of the executive. Equity regards that as done which ought to have been done. We do not have here the problem of deciding, contrary to the de-

cision of the official in which the statute lodged the power of decision, that the facilities in question were necessary. He decided that they were. We merely append the proper legal consequences to his decision by disregarding the invalid regulation which prevented him from putting his factual decision in legal form. We conclude, therefore, that the facilities acquired by the plaintiff before July 17, 1944, were eligible for accelerated amortization, and that the plaintiff is entitled to that amortization.

Substantially the same questions involved in the instant case were presented to the United States District Court for the District of Columbia in *The United States Graphite Co.* v. *Secretary of Commerce,* 71 F. Supp. 944. That was a suit by the plaintiff's predecessor, the Graphite Company, to compel the issuing authority to issue the certificates of necessity which would have entitled that company to the tax deductions which the plaintiff claims here. The District Court, Judge Pine sitting, denied relief. The United States Court of Appeals affirmed, 176 F. 2d 868, upon the opinion of Judge Pine. Judge Wilbur K. Miller of the Court of Appeals dissented, in an opinion with which we agree. The Supreme Court denied certiorari. 339 U.S. 904. The Government does not claim that that litigation made the dispute a *res adjudicata.* In the circumstances we are, naturally, skeptical of the correctness of our conclusions.

The plaintiff is entitled to recover. Entry of judgment will be suspended to await the filing by

the parties of a stipulation showing the amount due the plaintiff, according to our findings and opinion.

It is so ordered.

HOWELL, *Judge;* WHITAKER, *Judge;* and LITTLETON, *Judge,* concur.

JONES, Chief Judge, dissenting in part.

I agree that plaintiff should recover but the amount should be limited to 35 percent of the cost of the facilities.

I think the provision of Section 124 (f) (1) of the Internal Revenue Code which is as follows:

> (1) There shall be included only so much of the amount otherwise constituting such adjusted basis as is properly attributable to such * * * acquisition after December 31, 1939, as either the Secretary of War or the Secretary of the Navy has certified as necessary in the interest of national defense during the emergency period, which certification shall be under such regulations as may be prescribed from time to time by the Secretary of War and the Secretary of the Navy, with the approval of the President. * * *

clearly authorized the executive officials to limit the amount of the amortization. *United States Graphite Co.* v. *Harriman,* 71 Fed Supp. 944. *United States Graphite Co.* v. *Sawyer,* 176 F. 2d 868 (*certiorari* denied).

[Finding of Fact Omitted]

IN THE UNITED STATES COURT OF CLAIMS

No. 218-54

THE OHIO POWER COMPANY

v.

THE UNITED STATES

ORDER

On March 1, 1955, the court rendered an opinion holding that plaintiff was entitled to recover but suspended the entry of judgment pending the filing of a stipulation by the parties showing the amount due plaintiff in accordance with the court's opinion.

On March 25, 1955, said stipulation was filed signed on behalf of the plaintiff by its attorney of record and on behalf of the defendant by Assistant Attorney General H. Brian Holland, in which it is stated that in accordance with the court's decision there is due plaintiff the amounts set out below, together with interest as provided by law.

NOW, THEREFORE, IT IS ORDERED this thirtieth day of March, 1955, that judgment be and hereby is entered for plaintiff in the following sums together with interest on each as provided by law:

1943—Two million, sixty-five thousand seven hundred sixty-seven dollars and twenty-five cents ($2,065,767.25) of excess profits.

1944—One million, two hundred fifty-one thousand six hundred eighty-seven dollars and sev-

enty-one cents ($1,251,687.71) of excess profits,

1945—Two million, five hundred sixty-seven thousand nine hundred thirty-three dollars and twenty-six cents ($2,567,933.26) of income taxes.

By the Court

MARVIN JONES,
Chief Judge.

[caption omitted]

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner,

It is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 12th, 1955.

EARL WARREN,
Chief Justice of the United States.

Dated this 18th day of June, 1955.

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FILED
SEP 27 1955
HAROLD B. WILLEY, CL

IN THE

Supreme Court of the United States

October Term, 1955

No. 312

THE UNITED STATES, *Petitioner*

v.

THE OHIO POWER COMPANY

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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IN THE

Supreme Court of the United States

October Term, 1955

No. 312

THE UNITED STATES, *Petitioner*

v.

THE OHIO POWER COMPANY

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The petition for a writ of certiorari filed by the United States in the above-entitled case should be denied.

The issue is no longer a live one because the statute expired in 1945; there is no conflict of decisions, and the decision below is correct, fully effectuating the intention of Congress affirmatively expressed in the legislative history of Section 124 of the Internal Revenue Code of 1939.

In an Appendix attached are set forth lower court opinions in related cases which were omitted from petitioner's Appendix.[1]

JURISDICTION

On March 1, 1955, the Court of Claims entered its opinion and granted respondent's Motion for Summary Judgment, at the same time denying a similar motion of petitioner. The money judgment was suspended to await the filing of a stipulation by the parties showing the amount due. On March 25, 1955, the stipulation was filed and the court entered the amount of the money judgment on March 30, 1955. In an application dated June 17, 1955,[2] petitioner requested an extension of time to August 12, 1955, for filing a petition for a writ of certiorari. The application was

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[1] Petitioner fails even to mention that the Tax Court has adopted the view of the Court of Claims in *National Lead Co.*, 23 T.C., No. 123, decided March 14, 1955, involving precisely the same issue. See Appendix, p. 19.

[2] Respondent respectfully directs the attention of this Court to the fact that on June 17, 1955, more than 90 days had elapsed following the lower court's final determination that respondent was entitled to recover and the granting of respondent's Motion for Summary Judgment. 28 U.S.C. § 2101(c). Rule 38(c) of the Rules of the Court of Claims provides that ". . . where the Court determines that a party is entitled to recover and the amount of the recovery is reserved for further proceedings, the judgment on the question of the right to recover shall be final. . ." In *United States* v. *Caltex (Philippines) Inc.*, 344 U.S. 149, this Court granted a timely petition for a writ of certiorari to review the decision of the Court of Claims in 100 F. Supp. 970, where that court had determined that the plaintiffs were entitled to recover but had reserved for further proceedings the amount of recovery. See Stern, Supreme Court Practice (2d Ed. 1954), p. 42; *F.T.C.* v. *Minneapolis-Honeywell Co.*, 344 U.S. 206, 211-212.

granted by the Chief Justice on June 18, 1955. Respondent, on August 18, 1955, requested and was granted an extension of time to September 27, 1955, for the filing of its brief in opposition. Petitioner invokes this Court's jurisdiction under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Where the War Production Board certified taxpayer's entire emergency facility as necessary in the interest of national defense, did the Board have authority also to limit the amount of cost amortizable under Section 124 of the Internal Revenue Code of 1939 to only a part of the total cost of the certified emergency facility?

STATEMENT

During World War II the demand for electrical energy in the industrial areas of Ohio served by the taxpayer was unprecedented. Taxpayer's then existing facilities were inadequate to supply the needs of customers engaged in war production. Therefore, beginning in 1942 taxpayer undertook to expand. (R. 2-3.) Pursuant to the provisions of Section 124, taxpayer applied for and received four certificates of necessity from the War Department in 1942, 1943, and 1944. All these certificates certified that the entire construction of electric power facilities proposed in the applications was necessary in the interest of national defense during the emergency period, thereby entitling the taxpayer to amortize the total cost of those facilities over the 60-month period prescribed in the statute. (R. 19-20.)

On November 16, 1943, after two of above-mentioned certificates had been issued and while applications for the other two were still pending, taxpayer filed an

application for a fifth certificate. This application covered the construction of a 100,000 kilowatt steam generating plant and related equipment near Canton, Ohio, known as the "Tidd Project Emergency Facility." (R. 3, 20.)

In the meantime, the certifying function under Section 124 was transferred from the Secretaries of War and Navy to the War Production Board.[3] In January and July 1944, the Secretary of War issued the third and fourth certificates mentioned above certifying the electric power facilities listed therein as necessary to national defense and without any limitation upon the amount of amortizable cost.[4] (R. 20.) But in November 1944 the War Production Board issued to this

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[3] Executive Order 9406, 8 Fed. Reg. 16955, Dec. 17, 1943.

[4] For almost four years, from 1940, the Secretaries of War and Navy administered the certifying power entrusted to them by the statute. They consistently exercised only the single power to certify the construction or acquisition of facilities as necessary to national defense and did not attempt to specify that only some percentage of total cost would be entitled to the rapid amortization privilege. Petitioner states in footnote 6 of its Petition (p. 8) that the Senate Special Committee Investigating the National Defense Program "scored the War and Navy Departments for their failure" to use the percentage limitation. Examination of the cited S. Rep. No. 440, Pt. 2, 80th Cong., 2d Sess., p. 11, discloses only the statement that the W.P.B. official responsible for issuing certificates had testified he believed the cost of the war could have been reduced if the War and Navy Departments had used the percentage method adopted by W.P.B.

Any contention arising out of such testimony is of course directed to the wisdom of Congress in granting the right to amortize full cost and has no bearing on whether Congress did or did not grant the certifying agent the power to allow amortization of something less than the full cost of certified facilities. Obviously, the wisdom of legislation is not the concern of this Court.

taxpayer the fifth certificate, which had been applied for a year earlier, relating to the Tidd Project on which construction had commenced late in 1943. This certificate, which is in issue here, certified that the Tidd Project in its entirety was necessary in the interest of national defense, but attempted to limit the taxpayer's amortization right under Section 124 to 35 percent of the total cost of the project. (R. 4, 9, 21.)

This certificate was issued pursuant to an unpublished policy adopted by the Board attempting to limit the amortization deduction on necessary emergency facilities, as petitioner states, to the excess of wartime cost over normal pre-war cost (estimated to be 35 percent) where the facilities would presumably be useful in post-war operations (Petition for Certiorari, p. 3; R. 5-7).

When the five certificates were presented by this taxpayer to the Commissioner of Internal Revenue, he allowed amortization of the entire cost of the electric power facilities certified in the first four, but with respect to the Tidd Project certificate allowed amortization of only 35 percent of the construction cost despite the fact that the entire construction had been certified as necessary in the interest of national defense. At the time taxpayer received this certificate construction of the Tidd Project had been under way more than a year,[5] having been undertaken about the time it received other certificates from the War Department containing no limitation on the amount

[5] In order to expedite construction of national defense facilities Congress had written into the amortization law a provision specifically designed to encourage taxpayers to commence construction before receiving their certificates. Section 124(f)(3) of the Internal Revenue Code of 1939.

of construction cost amortizable. (R. 5-7, 8, 9, 20-22.) The percentage-of-cost policy which the Board applied was never promulgated in any regulation, nor was it otherwise published until after 1945.

The fundamental issue is whether Section 124(f)(1) of the Internal Revenue Code of 1939 conferred upon the War Production Board (successor to the Secretaries of War and Navy)

(1) the single power to certify that the construction or acquisition of facilities was "necessary in the interest of national defense," or

(2) the dual power to certify (a) the necessity of the construction or acquisition of the facility, and (b) the percentage of its cost which could be amortized for tax purposes during the "emergency period" of World War II.

There is absolutely no authority in Section 124(f)(1) empowering the Board to limit the amortizable base to some percentage of cost, and the legislative history conclusively establishes that Congress intended the statute to allow the certified facilities to be "completely written off for tax purposes" over a five-year period.[6]

Section 124 was enacted as a part of the Second Revenue Act of 1940, to be effective during the "emergency period" which was terminable by Presidential proclamation. The period was terminated by proclamation on September 30, 1945. (R. 20-22.)

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[6] Hearings before Senate Committee on Finance on Second Revenue Act of 1940, 76th Cong., 3d Sess. (1940), pp. 124, 125, 127; Cong. Rec., Aug. 29, 1940, pp. 11239, 11240, 11246. See also citations in footnotes 7 and 8, *infra*.

The statute was enacted for the express purpose of inducing private industry to invest its capital in projects necessary to national defense.[7] The inducement offered by the Administration and by Congress was that, in lieu of depreciation during normal useful life, the entire cost of projects certified as necessary in the interest of national defense would be deductible for income and excess profits tax purposes over a maximum period of sixty months, or over the "emergency period," if shorter. Thereby, private industry was assured that, to the extent its earnings in the emergency period equalled the cost of the national defense facilities, those earnings would be relieved from such taxes.[8]

The certifying agents (first the Secretaries of War and Navy, later the War Production Board) were authorized by Section 124(f)(1) to certify that the construction or acquisition of facilities was "necessary in the interest of national defense during the emergency period." When a certificate of necessity was issued the construction or acquisition became an "emergency facility." (Section 124(e).) Section 124 (a) provided that taxpayers might elect to deduct the

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[7] H.R., Rept. 2894, 76th Cong., 3d Sess., p 2; Joint Hearings before Committee on Ways and Means and Committee on Finance, Aug. 9, 10, 12-14, 1940, 76th Cong., 3d Sess., pp. 21-30; Statement of John D. Biggers, Tax Adviser to Council of National Defense at Hearings before Senate Committee on Finance on Second Revenue Act of 1940, 76th Cong., 3d Sess. (1940), pp. 166-167; Statement of William S. Knudsen, idem., p. 158.

[8] Joint Hearings before Committee on Ways and Means and Committee on Finance, August 9, 10, 12-14, 1940, 76th Cong., 3d Sess., pp. 74-75; Hearings before Senate Committee on Finance on Second Revenue Act of 1940, 76th Cong., 3d Sess., p. 123.

"adjusted basis" (i.e. cost) of any emergency facility over a period of sixty months, or over the emergency period if shorter.

Since the Commissioner failed to follow the mandate of Section 124(a) and allowed amortization of only 35 percent of the cost of constructing the Tidd Project, the taxpayer brought suit in the court below for refund of income and excess profits taxes paid in 1943, 1944 and 1945 with respect to the remaining 65 percent.

REASONS FOR DENYING THE WRIT

1. THE ISSUE IS NO LONGER A LIVE ONE

The certifying provisions of Section 124, under which this case arises, expired with the end of the emergency in 1945. In 1950 Congress enacted a new rapid amortization provision in connection with the Korean War excess profits tax law (Section 216 of Revenue Act of 1950; Section 124A Internal Revenue Code of 1939). In the new statute, Congress added a new clause, for the first time granting the certifying agent the power to certify a percentage of cost as well as the necessity of facilities.

A comparison of the two laws follows:

Section 124(f)(1)—1940-1945 Law	Section 124A(e)(1)—1950 Law
"[Sec. 124(f)]	"[Sec. 124A(e)]
"(f) DETERMINATION OF ADJUSTED BASIS OF EMERGENCY FACILITY.—In determining, for the purposes of subsection (a) or subsection (h), the adjusted basis of an emergency facility—	"(e) DETERMINATION OF ADJUSTED BASIS OF EMERGENCY FACILITY.—In determining, for the purposes of subsection (a) or subsection (g), the adjusted basis of an emergency facility—
"(1) There shall be included only so much of the amount otherwise constituting such adjusted basis as is properly attributable to such construction, reconstruction, erection, installation, or acquisition after December 31, 1939, as either the Secretary of War or the Secretary of the Navy has certified as necessary in the interest of national defense during the emergency period. . ."	"(1) There shall be included only so much of the amount of the adjusted basis of such facility (computed without regard to this section) as is properly attributable to such construction, reconstruction, erection, installation, or acquisition after December 31, 1949, as the certifying authority, designated by the President by executive order, has certified as necessary in the interest of national defense during the emergency period, *and only such portion of such amount as such authority has certified as attributable to defense purposes.* . ." (Italics supplied)

Thus, in the new law the Congress for the first time conferred upon the certifying agency the power to certify both (1) the necessity of the facilities, and (2) the amount of amortizable cost.

In the absence of the italicized clause in the second column, it is plain that the certifying agency had authority to certify only that the construction of facilities was necessary to national defense and had no power to specify that less than entire cost of construction of the certified facilities could be amortized.

Inasmuch as the old law has long since expired and the current law eliminates the question, the issue which petitioner seeks to have this Court review is dead. There is no reason for this Court to issue a writ in a case of this character where its decision will not aid the administration of current statutes. *Sokol Bros. Co.* v. *Commissioner,* 340 U.S. 932; *Community Services, Inc.* v. *United States,* 342 U.S. 932; *United States* v. *Abrams,* 344 U.S. 855; Stern, Denial of Certiorari Despite a Conflict, 66 Harv. L. Rev. 465, 466-468.

2. THERE IS NO CONFLICT OF DECISIONS

Three cases have been decided by the lower courts on the precise issue of the amount of the amortization deduction to which a taxpayer is entitled where the certificates of necessity have purported to limit the amortization right to a percentage of cost. All are in agreement that full cost is amortizable. Two of these decisions have been rendered by the Court of Claims—the case of *Wickes Corp.* v. *United States,* 108 F. Supp. 616, and the case at bar. The third decision is that of the Tax Court in the *National Lead* case, *supra,* to which petitioner does not refer. That opinion was reviewed by the 16 judges of the Tax Court and approved with only one dissent. The opinion adopts the view of the Court of Claims in the *Wickes* case and allows the taxpayer to amortize the full cost of the certified facilities over the accelerated period. (Appendix, p. 19.)

A different issue was involved in the case of *United States Graphite Co.* v. *Sawyer,* 176 F. 2d 868 (CA-D.C.), cert. den. 339 U.S. 904, affirming, *per curiam* without opinion but with one dissent, *United States Graphite Co.* v. *Harriman,* 71 F. Supp. 944 (D. Ct.

D.C.), relied upon by petitioner to establish a conflict. (Appendix, p. 8.) There the taxpayer sought a writ of mandamus directing the War Production Board to eliminate the 35 percent of cost limitation from the same Certificate of Necessity ultimately at issue in the *Wickes* case. The writ was denied. The District Court interpreted Section 124(f)(1) as granting authority to the War Production Board to certify both the necessity of the facilities and the percentage of cost entitled to amortization. On appeal, two judges adopted *per curiam* the District Court's opinion, but Judge Wilbur K. Miller, in a well-considered dissenting opinion, demonstrated that the majority had misconstrued the statute and had failed to give effect to the intention of Congress. (Appendix, pp. 8-18.) Both the Court of Claims and the Tax Court, in the later decisions, took care to state that they had reached the same conclusion as Judge Miller and agreed with his interpretation of Section 124(f)(1).

Even though the statutory interpretations conflict, it does not follow that the *Graphite* decision presents any direct conflict with the other three cases. It is hornbook law that the extraordinary writ of mandamus will not be issued to a governmental agency where the litigant has an adequate remedy at law. The later decision of the Court of Claims in the tax refund petition of the Wickes Corporation, successor to the U. S. Graphite Company, demonstrates that there was no legal basis for the issuance of a writ of mandamus.

Thus, it does not follow (as contended at p. 6 of the Petition) that the decisions are "irreconcilable" and that if the court in the *Graphite* case had interpreted the statute in the same way as the Court of Claims and the Tax Court, a writ of mandamus would have issued.

Quite the contrary, the court might well have held that the Graphite Company had not shown any injury from the Board's action and, if ultimately so injured, had an adequate legal remedy.

Petitioner can hardly be serious in its contention that the *Ohio* and *Wickes* decisions conflict with the *Graphite* case. If there is such a conflict, the Government most certainly would have applied for a writ of certiorari in the *Wickes* case two years ago, since the Solicitor General is virtually bound to bring conflicts in decisions of co-ordinate courts to the attention of this Court. Moreover, the Government would have asserted the defense of *res judicata* in the *Wickes* case, which it did not do.

3. THE AMOUNT INVOLVED IN THE ISSUE AT BAR IS MUCH LESS THAN STATED IN THE PETITION

The full cost of this taxpayer's facilities is deductible for income and excess profits tax purposes either through amortization in the World War II emergency period, or in later years through depreciation, obsolescence or other form of exhaustion. The revenue is affected only to the extent of differences in the tax rates. The maximum corporate tax rate in 1944 and 1945 was 80 percent of corporation surtax net income; the current corporate rate is 52 percent and in the intervening years the combined income and excess profits maximum tax rate has ranged from 38-70 percent.

On the basis of present corporate rates, the net tax reduction of the respondent here will be not more than approximately $2,000,000, instead of the amount of $5,885,388.22 stated in the Petition.

Correspondingly, the amounts involved in any similar claims will be vastly reduced. To the extent that

the claimants are individual taxpayers, such as partners or joint venturers, the difference in tax rates between the World War II years and current years is probably even less than for corporations. And, as to corporations which were not subject to the maximum tax rate of 80 percent in the latter years of World War II, the net tax reduction will also be smaller.

Eight cases in the courts and 31 at the administrative level do not create an issue of general importance where the operative provisions of the statute expired ten years ago.[9]

Nor has petitioner shown that the cases it states are pending depend solely for disposition on the issue involved in the instant case.

All the cases alleged to be now pending must have been open when the Solicitor General decided more than two years ago not to apply to this Court for a writ of certiorari in the *Wickes* case. That case, too, involved a not insignificant gross tax refund for 1944 and 1945. It is submitted he must have decided, then, that the *Wickes* decision was correct.

4. THE DECISION BELOW IS CORRECT

Twenty-five judges of lower courts, including the Tax Court, have considered the statutory interpretation of Section 124(f)(1) and the extensive legislative history showing the intent of Congress in enacting it.

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[9] In *Beal* v. *United States*, 182 F. 2d 565 (CA-6), certiorari was denied (340 U.S. 852) where the statute in controversy had expired in 1945, despite a conflict and despite the fact that the petition for certiorari pointed out that from 12,000 to 15,000 persons might claim from 16 to 22 million dollars in similar cases and that a number of cases were then pending.

Twenty agree that the decision below is correct; five disagree. Three of those disagreements were registered in the mandamus proceeding in the *Graphite* case decided by the District Court in 1947. With all due respect to the District Court, its opinion is superficial and glosses over both the statutory language and the intent of Congress. Most significantly, the dissenting opinion of Judge Miller in that case (Appendix, p. 8) has won the approval of four judges of the Court of Claims and 15 judges of the Tax Court. No comprehensive opinion has been written in support of the minority view since the opinion of the District Judge in 1947 (Appendix, p. 1), and no judge has undertaken to answer the compelling dissent of Judge Miller.

A comparison of the District Court's opinion with the dissenting opinion in the *Graphite* case and the majority opinion of Judge Madden in the *Wickes* case will demonstrate that the decision below correctly interprets the statute and effectuates the Congressional intent.

The pertinent part of Section 124(f)(1) provided:

> "(f) Determination of Adjusted Basis of Emergency Facility.—In determining, for the purposes of subsection (a) * * *, the adjusted basis of an emergency facility—
>
> "(1) *There shall be included* only *so much of* the amount otherwise constituting *such adjusted basis as is properly attributable to such construction * * * or acquisition after December 31, 1939,* as either the Secretary of War or * * * the Navy has certified as necessary in the interest of national defense * * *." (Italics supplied.)

At the outset it is important to observe that the section is a direction to the Internal Revenue Commissioner as to the cost of the facility which he shall include in determining the taxpayer's amortization deduction under Section 124(a). It is not a Congressional directive to the Secretaries that they shall include in the Certificate only so much of the cost as they deem necessary in the interest of national defense.

In essence, as applied to this case, subsection(f)(1) provides for inclusion in amortizable basis the full cost attributable to the construction of facilities *after December 31, 1939*, if such construction has been certified as necessary in the interest of national defense.

The first question framed by the statute is whether the construction has been certified as necessary in the interest of national defense. That fact is of course established here.

The sole remaining question framed by subsection (f)(1) is what part of the cost ("adjusted basis") "is properly attributable" to construction or "acquisition after December 31, 1939." The statute includes for amortization purposes only the cost of construction or acquisition after December 31, 1939. Congress plainly desired to draw a line dividing the cost of those emergency facilities which were under construction on December 31, 1939, in order to prevent the amortization of the pre-1940 part of the cost of construction.[10] An examination of subsection (e) defining an "emergency facility" will show that the term means any certified facility the construction or acquisition of which was *completed* after December 31, 1939. Thus,

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[10] H.R. Rept. No. 2894, 76th Cong., 3d Sess. (1940) p. 38, quoted *infra* at pages 17-18.

Congress contemplated that necessity certificates would be issued by the certifying agency with respect to construction or acquisition commenced on or before December 31, 1939. But by the terms of subsection (f) (1) Congress directed the inclusion in the adjusted basis (i.e., cost) entitled to amortization only the cost attributable to the part of the construction or acquisition occurring after December 31, 1939 and did not in any way restrict that amortization right to some portion of such cost.

The District Court in the *Graphite* case, however, seized upon the phrase "only so much of the amount otherwise constituting such adjusted basis" as authorizing the War Production Board to certify a percentage of cost for tax amortization as well as the construction or acquisition of facilities.

In order to reach the conclusion that the certifying agency was granted control over the amount of amortizable cost it would be necessary to interpret the statute *as if it read* somewhat as follows:

> In determining the adjusted basis of an emergency facility, there shall be included only so much of the cost [adjusted basis] otherwise amortizable as either the Secretary of War or the Secreary of the Navy has certified as necessary in the interest of national defense during the emergency period.

Such interpretation ignores the all-important phrase following immediately after the statutory words "only so much of the * * * adjusted basis." The ignored phrase is:

> "as is properly attributable to such construction ... or acquisition after December 31, 1939, ..."

At best, the word "such" immediately preceding "construction ... or acquisition" must be deleted to reach the interpretation for which the Government contends. This is exactly what the District Judge did in the *Graphite* case. (Appendix, p. 1, at 5-6.) Judge Miller, in his illuminating dissent, refers to this omission in demonstrating the District Court's misconstruction of the statute. (Appendix, pp. 15-16.) When the word "such" is given its proper meaning it becomes plain that the power of the Secretaries was limited to certification of *such* "construction ... or acquisition," and did not extend to certification of amortizable cost.

If there were any doubt about the correct interpretation of the words of Section 124(f)(1) it is quickly dispelled by a review of the legislative history. It is conclusive of the fact that the Congress intended the full post-1939 cost of certified facilities to be included in the base for tax amortization.

The report of the Ways and Means Committee stated:[11]

> "Section 124 provides that a corporation shall be allowed a deduction for income and excess-profits tax purposes for the amortization of certain facilities which ... either the Secretary of War or the Secretary of the Navy certify as necessary in the interest of national defense during the present emergency. Such facilities are land, buildings, machinery and equipment or parts thereof acquired after July 10, 1940 [changed to December 31, 1939], or the construction, reconstruction, erection, or installation of which was completed after July 10, 1940 [changed to December 31, 1939]. ... Although a facility may be an emergency facility even though its construction was

[11] H.R. Rept. No. 2894, 76th Cong., 3d Sess. (1940) p. 38.

begun on or before July 10, 1940 [changed to December 31, 1939], only so much of its adjusted basis as is attributable to certified construction taking place after July 10, 1940 [changed to December 31, 1939], is subject to amortization. The remainder of the adjusted basis is subject to depreciation. . . ."

Assistant Secretary of the Treasury Sullivan testified before the Senate Finance Committee as follows:[12]

"Senator George: Just a minute, Mr. Sullivan. You say it is necessary for them to certify that it is necessary to national defense. Do they stop there?

"Mr. Sullivan: I beg your pardon.

"Senator George: Is the certificate that is issued on the recommendation of the National Council and the Secretary of War or Navy, as the case may be, limited to mere certification that the particular facility is necessary for defense, or do they go further and specify what the depreciation and obsolescence amounts to?

"Mr. Sullivan: No; they do not.

"Senator George: They turn that back to the Treasury?

"Mr. Sullivan: No sir; under the bill automatically the amortization to which they are entitled is 20 percent, a year, for 5 years."

When the statute was before the House of Representatives for enactment, Representative Boehne of Indiana, a member of the Ways and Means Commit-

[12] Hearings before Senate Finance Committee on Second Revenue Act of 1940, 76th Cong., 3d Sess. (1940) p. 158.

tee and its subcommittee on Internal Revenue Taxation, made the following statement on the floor:[13]

> "Now just what do these amortization provisions do? First, they fix the useful life of facilities certified to be necessary in the national defense as 5 years. They remove all problems of proof.
>
> "Second, there is no bounty, bonus, or windfall involved. Introducing certainty into the present provision is a desirable improvement. It is designed to give the manufacturer, who is asked to furnish needed new facilities, only a fair break.
>
> "Finally, the effect of the clearing-up process is to give a straight-line basis—20 percent a year —* * *.
>
> * * * * *
>
> "In the present national emergency, business is asking no favor of the Government when it merely desires the certainty that private capital expended to construct, or used to acquire, a needed new facility, certified to be necessary for the national defense, may under this law be amortized over a 5-year useful life, which is what business is being told is the present program. If the emergency lasts longer * * * no further deductions * * * will be allowed. The proposed amortization provisions will do no more than is fair and just. It will certainly aid national defense."

The legislative history destroys completely petitioner's contention that the 35 percent limitation is justified by the presumption that the facility would have post-war use. It leaves no doubt that Congress intended

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[13] Congressional Record, Aug. 29, 1940, p. 11240. See also the statement of Representative Jere Cooper, Chairman of the Subcommittee on Internal Revenue Taxation at the time Section 124 was enacted, Id., p. 11246.

to disregard the possible post-war value and utility of the certified facilities in allowing the amortization deduction. William S. Knudsen, a member of the Advisory Commission to the Council of National Defense, testified before the Senate Finance Committee that the Commission unanimously recommended against any provision restricting the post-war use of amortized facilities, and stated:[14]

> "If, at the end of the emergency, it turns out that plant facilities are useful for productive purposes during the emergency period only, the taxpayer is being only fairly dealt with by allowing him to charge off his plant against taxable income during the emergency period. If, however, the plant has productive use after the emergency period is terminated, there is no over-all advantage to the taxpayer in the rapid amortization because during the period after the emergency it will no longer be able to deduct depreciation or amortization on the plant, it having already been completely written off for tax purposes."

In the same Hearings, Senator Vandenberg questioned Secretary Sullivan on this point. In reply, Mr. Sullivan stated:[15]

> "We don't know that that [i.e., a five-year period or less] is the expected useful life. There are certain facilities that are being constructed for purely national-defense projects, which may be just as useful after the war is over, or the present emergency is over, or the particular contract they are built to perform is over, as they

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[14] Hearings before Senate Committee on Finance on Second Revenue Act of 1940, 76th Cong., 3d Sess., p. 159.

[15] Hearings before Senate Finance Committee on Second Revenue Act of 1940, 76th Cong., 3d Sess., p. 124.

> are during the time that contract is being performed."

Secretary Sullivan added:[16]

> "... I couldn't say to this committee that it is reasonable to expect that an ultra-modern factory that is to be constructed in the latter part of 1940 or the first part of 1941, built with all of the latest skill and engineering experience, is going to be absolutely useless in 1946. I don't think that is 'reasonable,' and yet I believe it is desirable and prudent to grant this amortization to those companies that are putting up new facilities for this picture."

Thereafter, Congress enacted practically unchanged, as Section 124 of the Internal Revenue Code, the provisions discussed before the Senate Finance Committee.

The attempt of the petitioner at pages 11-12 of its Petition to push aside the enlightening legislative history must completely fail. The legislative history does "aid in answering the question here at issue" because it specifically shows Congress withheld from the Board the power to certify a percentage of cost which is the question at issue. In view of the many representations which Congress and the Administration had made to encourage the Ohio Power Company and other taxpayers to invest their private capital in defense facilities, and having been granted four certificates under section 124 permitting the amortization of the full cost of similar defense facilities over the emergency period, the 35 percent limitation placed on the fifth certificate creates, as Judge Miller said, a

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[16] Id., p. 125.

result in this case "so incongruous as to be almost grotesque." (Appendix, p. 18.)

The petitioner is equally in error at page 11 when it suggests that the question before the Board was not, "Is the facility necessary," but "How necessary." As heretofore demonstrated, Congress intended to leave only the first question to the certifying agent.

Nor do the Treasury Regulations recognize and provide for Necessity Certificates with percentage of cost limitations as claimed by petitioner (Petition for Certiorari, p. 10).

Sec. 29.124-6[17] deals with three situations:

(1) Where the entire construction was certified and all of it took place after December 31, 1939. (2d ¶)

(2) Where the entire construction was certified but only a portion of such construction took place after December 31, 1939. (3d ¶)

(3) Where only a portion of the construction taking place after December 31, 1939, was certified as necessary. (4th ¶)

In each instance the regulation provides for amortization under Section 124 of the whole post-1939 cost of the *construction certified*. Petitioner therefore is not correct in its statement at page 10 of the Petition that the regulation "specifically envisions partial certifications of the type here issued." The "50 percent

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[17] Reg. 111, Sec. 29.124-6, reproduced at pp. 16-18 of Appendix A to Petition.

Of course, the very fact that the Treasury Regulations deal with the amount of amortizable cost allowable under Certificates demonstrates that the War Production Board had no power to certify amortizable cost but only to certify physical facilities.

certificate" referred to is one where only 50 percent of the *construction* was certified as necessary to national defense. It does not, as petitioner would like this Court to believe, deal with the case at bar, where the entire construction was certified as necessary but its amortizable cost purportedly was limited to 35 percent because the facility was presumed to have post-war utility.

Petitioner also argues that, even if the lower court's interpretation of the statute was correct, it was improper for the court below to allow amortization deductions based on full cost of the taxpayer's certified facility (Petition, pp. 12-13). The contention stems from a misapprehension of the nature of this proceeding. This is not a suit for judicial review of some discretionary action of an administrative body such as is the case of *F.P.C.* v. *Idaho Power Co.*, 344 U.S. 17, cited by petitioner. The suit is for a refund of taxes due upon the basis of giving effect to a certification of the fact that this taxpayer's "Tidd Project Emergency Facility" was necessary in the interest of national defense during the emergency period. The court below merely held that the Certificate met the requirements of Section 124 and applied the mandate of subsection (a) that the "adjusted basis" (i.e. cost) of the certified facility was entitled to be amortized over a sixty months period, or during the emergency period if shorter.

CONCLUSION

There are no valid reasons for granting the petition for a writ of certiorari. The decision below correctly construes Code Section 124 to give effect to the clear intent of Congress. There is no conflict of decisions. The Tax Court of the United States, which is the only other court to decide the precise issue, has joined the Court of Claims in holding against the Government. The problem is not of the scope which merits a review by this Court because the statute involved expired ten years ago and only a few claims remain to be disposed of under that statute. The petition should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

APPENDIX

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

UNITED STATES GRAPHITE COMPANY,

v.

HARRIMAN, SECRETARY OF COMMERCE.

No. 36695

Filed June 17, 1947

Opinion

J. Marvin Haynes, of Washington, D. C., for plaintiff.

John F. Sonnett, Asst. Atty. Gen., and *Edward H. Hickey,* Sp. Asst. to Atty. Gen., for defendant.

PINE, *Justice:*

Plaintiff is a manufacturer of a graphite product known as "graphitar." It is used particularly in the manufacture of marine and aircraft engines. In 1943 the demand for graphitar began to exceed the capacity of plaintiff's plant. Accordingly, plans were made for a factory addition. and for the necessary machinery and equipment therein required. On June 27, 1943, plaintiff filed an application for a certificate of necessity under Section 124 of the Internal Revenue Code, in order that it might secure a deduction for amortization of the entire cost of the factory addition upon its Federal income and excess profit tax returns, and

on October 28, 1943, a necessity certificate was issued therefor.

On May 29, 1944, plaintiff filed an application for a necessity certificate covering facilities (machinery, etc.) for use in the factory, which had then been constructed. Thereafter plaintiff received a communication dated July 17, 1944, and entitled "letter of predetermination," stating that these facilities were eligible for tax amortization on a 35% basis, provided the date of acquisition was subsequent to the date of such letter. On July 27, 1944, plaintiff filed an affidavit showing that a portion of such facilities had been acquired prior to the date of the letter of predetermination and that the balance had been acquired thereafter; whereupon there was issued to the plaintiff a necessity certificate for that part of the facilities listed as being received after the date of the letter of predetermination, up to 35% of their cost. Thereafter plaintiff demanded the issuance of a certificate which would include the entire cost of all the facilities, irrespective of the date of acquisition. This being refused, plaintiff brought this action to compel its issuance.

Defendant first moved to dismiss the complaint, and subsequently moved for a summary judgment. The action is before me for decision on these motions.

The issuance of this certificate of necessity is authorized by Section 124 of the Internal Revenue Code, 26 U. S. C. 124. Designed to stimulate the investment of private capital in defense facilities, this statute authorized the amortization of their cost as a tax deduction over a period of five years or less.

Plaintiff contends that defendant's predecessor, the War Production Board,[1] had no legal right to issue a necessity certificate for only 35% of the cost of the facilities acquired after the date of the letter of predetermination, but, once having determined to issue a necessity certificate, was required to issue one for the entire cost of the facilities acquired, both before and after such date.

The applicable provisions of this statute are contained in Section 124(f) of the Internal Revenue Code, reading, so far as material, as follows:

> "(f) . . . In determining . . . the adjusted basis of an emergency facility—
>
> > "(1) There shall be included only so much of the amount otherwise constituting such adjusted basis as is properly attributable to such . . . acquisition after December 31, 1939, as either the Secretary of War or the Secretary of the Navy has certified as necessary in the interest of national defense during the emergency period, which certification shall be under such regulations as may be prescribed from time to time by the Secretary of War and the Secretary of the Navy, with the approval of the President.
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> > "(3) The certificate provided for in paragraph (1) shall have no effect unless an application therefor is filed before the expiration of six months after the

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[1] Defendant's immediate predecessor was the Temporary Controls Administrator, whose predecessors were, in the order named, Civilian Production Administrator and the War Production Board, the Chairman of which was vested with the functions of the Secretary of War and the Secretary of the Navy under Section 124 of the Internal Revenue Code.

Executive Order No. 9841, April 23, 1947.
Executive Order No. 9809, December 12, 1946.
Executive Order No. 9638, October 4, 1945.
Executive Order No. 9406, December 17, 1943.

beginning of such construction, reconstruction, erection, or installation, or the date of such acquisition . . ."

The applicable provisions of the Regulations[2] prescribed under the above-quoted statute are as follows:

"(3)(c)(vi) *Government and privately financed facilities.* Necessity Certificates will be issued only where it is to the advantage of the government that the facilities in question be privately financed.

"(4) *Application must be filed before construction is begun or date of acquisition.* The construction, reconstruction, erection, installation or acquisition of a facility will not be deemed necessary within the terms of these regulations unless a determination of necessity is made by the certifying authority prior to the beginning of the construction, reconstruction, erection, installation or date of acquisition."

It will be noted that Section 4 of the Regulations, above quoted, provides that the acquisition of a facility will not be deemed necessary unless a determination of necessity is made prior to the date of acquisition. Defendant's action in limiting the certificate of necessity to the facilities acquired after the letter of predetermination appears to be authorized by this regulation, and plaintiff does not contend to the contrary. Instead, it places its reliance upon the claim that the regulation contravenes the statute. The question, therefore, is whether the six-month period may be shortened by regulation, the effect of which was to apply a brake on over-expansion of plant facilities, by requiring their necessity to be determined prior to

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[2] Regulations governing the issuance of necessity certificates under Section 124(f) of the Internal Revenue Code prescribed by the Chairman of the War Production Board with the approval of the President, dated December 17, 1943. 8 F.R. 16964.

acquisition in order to be eligible for tax amortization. As above set forth, the statute provides that the necessity certificate shall have no effect unless application therefor is filed before the expiration of six months after date of acquisition. But the statute also contemplates its implementation by regulation, and expressly provides that certification of necessity shall be under regulations prescribed from time to time by the executive officials. Under defendant's interpretation, the statute permits these officials, in the exercise of discretion, to shorten, by regulation, the time for filing applications for necessity certificates, but places an outside limit of six months on their effectiveness, beyond which executive discretion ceases. This construction would seem to be warranted, in view of the clear purpose of Congress to provide flexibility in administration to meet changing conditions and circumstances in the prosecution of the defense program; but in any event, defendant's construction being reasonable, it cannot be set aside by the courts in this proceeding.[3]

In respect of the second contention of plaintiff, that the statute does not authorize defendant to limit the amortization deduction to 35% of the cost, it should

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[3] Adams v. Nagle, 303 U.S. 532, 542.
Wilbur v. United States ex rel Kadrie, 281 U.S. 206, 219.
Work v. United States ex rel Rives, 267 U.S. 175, 182, 183.
United States ex rel Riverside Oil Co. v. Hitchcock, 190 U.S. 316, 323.
Thomas v. Vinson, 80 U.S. App. D.C. 346, 349.
Red Canyon Sheep Co. v. Ickes, 69 App. D.C. 27, 41.
United States ex rel Corbin v. Doyle, 68 App. D.C. 100, 104.
United States ex rel White v. Coe, 68 App. D.C. 218, 220.
Ickes v. Pattison, 65 App. D.C. 116, 119.
Reichelderfer v. Johnson, 63 App. D.C. 334.
Stookey v. Wilbur, 61 App. D.C. 117, 118.

be pointed out that the statute requires that there shall be included ONLY SO MUCH of the amount as is properly attributable to acquisition after December 31, 1939, as either the Secretary of War or the Secretary of the Navy [later Chairman, War Production Board] has certified as necessary in the interest of national defense, which certification shall be under such regulations as may be prescribed from time to time by the executive officials with the approval of the President. Among the regulations prescribed is Section (3) (c) (vi), *supra,* which provides that necessity certificates will be issued only where it is to the advantage of the government that the facilities be privately financed. Certification under this statute, as implemented by this regulation, clearly involved an exercise of discretion, which will not be set aside unless unreasonable, arbitrary, or capricious.[4] Here the certification was made pursuant to an established policy of the War Production Board which, after December 17, 1943, was vested with the functions of the Secretary of War and the Secretary of the Navy (Executive Order 9406). This policy limited amortization to excess war cost (estimated at 35%) in the case of facilities having presumptive postwar utility, which was found by the Board to be true of the facilities here involved. This would appear to be in furtherance of the legislative purpose to encourage capital investment

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[4] Wilbur v. United States ex rel Kadrie, supra.
Work v. United States ex rel Rives, supra.
United States ex rel Riverside Oil Co. v. Hitchcock, supra.
Calf Leather Tanners Assn. v. Morgenthau, 65 App. D.C. 93, 98, 99.
United States ex rel Bowling v. Hines, 60 App. D.C. 180, 181.
McCarl v. Rogers, 60 App. D.C. 111.
McCarl v. Walters, 59 App. D.C. 237, 238.

in the defense effort which would not be available because of fear that such investment would have no post-war value, and at the same time maintain the amortization benefits under such control that they would not unduly injure the revenue. Thus there is no showing that the exercise of this discretion comes within the exception permitting courts to intervene. So far as its exercise involves interpretation of the statute in question, the statement made in the preceding paragraph is equally applicable to the point here under discussion.

Accordingly the motion for summary judgment will be granted. Counsel will present, on notice, judgment carrying this opinion into effect.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 9680

THE UNITED STATES GRAPHITE COMPANY, APPELLANT

v.

CHARLES SAWYER, SECRETARY OF COMMERCE, APPELLEE

Appeal from the District Court of the United States for the District of Columbia (now United States District Court for the District of Columbia)

Argued October 7, 1948 Decided February 28, 1949

Mr. J. Marvin Haynes, with whom *Messrs. W. C. Magathan* and *F. Eberhart Haynes* were on the brief, for appellant.

Mr. Edward H. Hickey, Special Assistant to the Attorney General, with whom *Messrs. George Morris Fay,* United States Attorney and *Richard E. Guggenheim,* Attorney, Department of Justice, were on the brief, for appellee. *Mr. Herbert A. Bergson,* Acting Assistant Attorney General, also entered an appearance for appellee.

Before EDGERTON, CLARK, and WILBUR K. MILLER, JJ.

PER CURIAM: The judgment is affirmed on the opinion of Judge Pine in the District Court. *United States Graphite Co.* v. *Harriman,* 71 Fed. Supp. 944.

WILBUR K. MILLER, J., dissenting: As my brethren have approved and adopted the District

Court's opinion without reproducing it, I shall restate the case before giving the reasons for my dissent.

In an effort to induce private enterprise to use its own funds in expanding manufacturing facilities to meet the requirements of national defense, the Congress enacted in 1940 § 124 of the Internal Revenue Code. Subsection (a) thereof is in part as follows:

> "Every person, at his election, shall be entitled to a deduction with respect to the amortization of the adjusted basis (for determining gain) of any emergency facility (as defined in subsection (e)), based on a period of sixty months. . . ."

This is unequivocal and imperative language and is a grant of a right to the deduction described. If a later provision of § 124 is to be held to have modified a taxpayer's absolute right to the five-year amortization described in subsection (a) by giving to an administrative agency authority to restrict the amortization to something less than the entire cost, I take it that the intention of Congress to do so should be expressed in clear and unmistakable terms.

An emergency facility was defined by subsection (e) as one (a) which had been constructed or acquired after December 31, 1939, and (b) which had been certified by the proper authority as necessary in the interest of national defense.[1]

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[1] The pertinent portion of subsection (e) is as follows:

> "(1) *Emergency facility.* As used in this section, the term 'emergency facility' means any facility, land, building, machinery, or equipment, or part thereof, the construction, reconstruction, erection, installation, or acquisition of which was completed after December 31, 1939, and with respect to which a certificate under subsection (f) has been made. For

The appellant is a manufacturer of a graphite product known as "graphitar." In 1943 when the government required for war purposes greater quantities of graphitar than appellant could produce, the War Department insisted that it double its capacity by erecting a new building and installing therein the necessary machinery and equipment.

Relying—naively, as it turned out—on the provisions of § 124 of the Internal Revenue Code, the appellant erected the building and began the acquisition of machinery and equipment. With respect to the building, the appellant applied on June 27, 1943, for a necessity certificate under subsection (f)(1) of § 124, and received it from the Secretary of War on October 28, 1943. The entire cost of the building could therefore be amortized for tax purposes in the statutory five-year period. But with the acquisition of machinery, the appellant's troubles began. On May 29, 1944, and within six months after the installation of certain

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the purposes of this section, the part of any facility which was constructed, reconstructed, erected, or installed by any person after December 31, 1939, and not earlier than six months prior to the filing of an application for a certificate under subsection (f), and with respect to which part a certificate under subsection (f) has been made, shall be deemed to be an emergency facility, notwithstanding that the other part of such facility was constructed, reconstructed, erected, or installed earlier than six months prior to the filing of such application. For the purposes of this section, the part of any facility which was constructed, reconstructed, erected, or installed by a corporation after December 31, 1939, and before June 11, 1940, and with respect to which part a certificate under subsection (f) has been made, shall be deemed to be an emergency facility and to have been completed on June 10, 1940, notwithstanding that the entire facility was not completed until after June 10, 1940."

machinery and equipment, appellant applied for a covering necessity certificate to the War Production Board, which by Executive Order had succeeded the Secretaries of War and the Navy as the certifying agency. Although both building and machinery were essential to the increased production which the War Department wanted, the War Production Board refused to certify the full cost of the machinery. The Board issued to appellant on July 17, 1944, what it called a "letter of predetermination", stating the machinery and equipment would be eligible for amortization, but attaching two conditions which the appellant asserts were unauthorized.

Those conditions were: (1) that the machinery and equipment acquired by the appellant prior to July 17, 1944, the date of "predetermination", could not be amortized, and (2) that only 35 per cent of the cost of machinery and equipment acquired after that date could be amortized.

The first condition was imposed by the Board pursuant to its own regulation that a necessity certificate would not be issued unless application therefor had been made before the construction or acquisition of the facility.

The second condition was imposed by the Board because it had concluded that only 35 per cent of the cost of appellant's machinery installed after the date of "predetermination" could be certified as necessary to national defense, its idea being that "the facilities sought to be certified were of such a nature as to be presumably useful in post-war operations." Apparently the Board's theory was that 35 per cent of the cost of the machinery represented war-caused excess over the pre-war cost.

With respect to the first condition imposed by the Board pursuant to its regulation that application for certification must be made before the facility had been constructed or acquired,[2] the question is as to the validity of the regulation. To be sure, the Board had express authority under subsection (f)(1) to prescribe regulations governing certification. But a regulation may not conflict with the statute under which it is promulgated.

This regulation is in direct conflict with subsection (f)(3) of the statute, the pertinent portion of which follows:

> "(3) The certificate provided for in paragraph (1) shall have no effect unless an application therefor is filed before the expiration of six months after the beginning of such construction, reconstruction, erection, or installation or the date of such acquisition, or before December 1, 1941, whichever is later, ..."

Because of the conflict with the statute, the regulation was invalid and did not confer upon the War Production Board power to exclude from the necessity certificate all the cost of the machinery and equipment which the appellant acquired prior to July 17, 1944. Application for certification of that cost was season-

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[2] The regulation, dated December 17, 1943, 8 Fed. Reg. 16964, was approved by the President and the pertinent portion is as follows:

> "(4) *Application must be filed before construction is begun or date of acquisition.* The construction, reconstruction, erection, installation or acqisition of a facility will not be deemed necessary within the terms of these regulations unless a determination of necessity is made by the certifying authority prior to the beginning of the construction, reconstruction, erection, installation or date of acquisition."

ably made under the terms of the statute and could not be refused on the ground that the application had not been made before acquisition as required by the invalid regulation.

The second condition imposed by the Board in its "letter of predetermination" which restricted the taxpayer to a deduction with respect to the amortization of only 35 per cent of the cost of its machinery and equipment acquired after July 17, 1944, was authorized, the appellee contends, by § 124 (f)(1), which is as follows:

> "... In determining, for the purposes of subsection (a) or subsection (h), the adjusted basis of an emergency facility—
>
> "(1) There shall be included only so much of the amount otherwise constituting such adjusted basis as is properly attributable to such construction, reconstruction, erection, installation, or acquisition after December 31, 1939, as either the Secretary of War or the Secretary of the Navy has certified as necessary in the interest of national defense during the emergency period, which certification shall be under such regulations as may be prescribed from time to time by the Secretary of War and the Secretary of the Navy, with the approval of the President."

In order to reach the extraordinary conclusion that subsection (f) (1) authorizes the certification as necessary to national defense of less than 100 per cent of the cost of a facility otherwise "emergency" in character, the appellee is forced to read subsection (f)(1) as though it provided:

> There shall be included in amortizable cost only so much of the cost of the facility as ... the Secretary ... has certified as necessary in the interest of national defense ....

Such reading omits important words in the subsection. It overlooks completely the fact that its language includes the following:

> "... as is properly attributable to such construction ... after December 31, 1939, as ... the Secretary ... has certified as necessary in the interest of national defense. ..."

The appellee's construction of subsection (f)(1) as meaning "only so much of the cost as has been certified as necessary in the interest of national defense" does plain violence to the grammatical structure of the statutory sentence, for, as has been said, it leaves out important words. Careful reading of the poorly worded subsection reveals its meaning as

> There shall be included as amortizable cost only so much of the cost of the facility as is properly attributable to the part of it which was constructed after December 31, 1939, and which has been certified as necessary in the interest of national defense.

We have seen that subsection (e), in defining the term "emergency facility", expressly excluded anything constructed or acquired before December 31, 1939. That critical date of subsection (e) was carried on into subsection (f)(1), which undertook to govern a situation involving a facility, a part of which was constructed before December 31, 1939, and so could not be amortized, and the other part of which was constructed after that date and so could be certified for amortization. I admit the Congress did a poor job of statute writing in framing subsection (f)(1); but when all the subsections are read together the meaning can be spelled out. The mere fact that subsection (f)(1) is so written does not justify a construction of it which eliminates important words and thereby dis-

torts it. I think subsection (f)(1) clearly means there can be amortized only the "adjusted basis" (which in this case means cost) of that physical portion of a facility which is "emergency" in character in that (a) it had been constructed after December 31, 1939, and (b) it had been properly certified as necessary in the interest of national defense.

The District Court's opinion, which has been adopted by my brethren as the opinion of this court, includes the following:

> "In respect of the second contention of plaintiff, that the statute does not authorize defendant to limit the amortization deduction to 35% of the cost, it should be pointed out that the statute requires that there shall be included ONLY SO MUCH of the amount as is properly attributable to acquisition after December 31, 1939, as either the Secretary of War or the Secretary of the Navy [later Chairman, War Production Board] has certified as necessary in the interest of national defense, which certification shall be under such regulations as may be prescribed from time to time by the executive officials with the approval of the President."

I suggest, with deference, that the foregoing is a distortion of the grammatical construction of the statutory sentence. It leaves out significant words in the statute, as I have pointed out heretofore. For the statute says "only so much of the amount ... as is properly attributable to such construction ... as ... the Secretary ... has certified as necessary in the interest of national defense." Obviously the meaning is "such construction as the Secretary has certified as necessary"; therefore, that there shall be included only so much of the cost as is properly attributable to such construction, after the critical date, as has been certified as necessary. If that were not true, the word

"such" before the word "construction" would be without significance.

The opinion of the District Court continues thus:

> "... Here the certification was made pursuant to an established policy of the War Production Board which, after December 17, 1943, was vested with the functions of the Secretary of War and the Secretary of the Navy (Executive Order 9406). This policy limited amortization to excess war cost [estimated at 35%] in the case of facilities having presumptive postwar utility, which was found by the Board to be true of the facilities here involved. This would appear to be in furtherance of the legislative purpose to encourage capital investment in the defense effort which would not be available because of fear that such investment would have no postwar value, and at the same time maintain the amortization benefits under such control that they would not unduly injure the revenue."

This amounts to saying that Congress intended to write into § 124 the idea of value for post-war use which was the basis of amortization under a somewhat similar statute enacted in 1918.

Under the 1918 act, if a facility had post-war useful value the difference between that estimated value and actual cost was allowed as a special amortization deduction. The legislative history of the act now under consideration convincingly demonstrates that Congress deliberately and purposefully departed from the principle of the 1918 act because experience had demonstrated it to be unsatisfactory and not productive of the desired result.

I shall not prolong this dissent by going fully into the legislative history of § 124. One brief quotation from the testimony of the Assistant Secretary of the

Treasury before the Senate Finance Committee will suffice to indicate the understanding which Congress had of the section as shown by the entire voluminous legislative history.

> "Senator George: Is the certificate that is issued on the recommendation of the National Council and the Secretary of War or Navy, as the case may be, limited to mere certification that the particular facility is necessary for defense, or do they go further and specify what the depreciation and obsolescence amount to?
>
> "Mr. Sullivan: No, they do not.
>
> "Senator George: They turn that back to the Treasury?
>
> "Mr. Sullivan: No, sir; under the bill automatically the amortization to which they are entitled is 20 per cent a year, for 5 years."

At the time this discussion took place, subsection (f)(1) had been passed by the House and after this testimony the only change was to eliminate any participation by the Council of National Defense, leaving the certifying power to the Secretaries of War and the Navy.

We should remember that the five-year amortization provision is in reality nothing more than an acceleration of the ordinary allowable depreciation which in the course of time would retire the property.

A proposal that the government shall own all property which has been fully depreciated at the ordinary allowable rate would be generally rejected as unsound. It is therefore illusory to suggest, as was done in argument, that the government should take over all facilities fully amortized in five years under § 124. A suggested inclusion in the act of a provision that the

government might acquire the facility at the end of amortization for the nominal cosideration of $1.00 was rejected during congressional consideration.

After exhaustive study, I have been able to discover nothing in the language of the act, or in its legislative history, to indicate the Congress intended to give the certifying agency the right to determine that only a portion of the cost of a necessary facility could be amortized. The result in this case is so incongruous as to be almost grotesque. Here the War Department, badly in need of large quantities of graphitar, insisted that the appellant erect a new building and equip it with the necessary machinery, which the appellant proceeded to do. The Secretary of War certified the building to have been necessary in the interest of national defense. It does not comport with common sense for the War Production Board in 1944 to certify that only 35 per cent of a fraction of the cost of the machinery was necessary in the interest of national defense. The building alone could not produce graphitar and yet the building was certified as necessary in its entirety. It is not suggested that the need for graphitar was any less pressing in 1944 than in 1943.

For the reasons given I think the decision of the court is wrong. The judgment of the District Court should be reversed.

IN THE TAX COURT OF THE UNITED STATES

Docket No. 37694

(Filed March 14, 1955)

NATIONAL LEAD COMPANY, *Petitioner,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

Floyd F. Toomey, Esq., and *Karl Reimer, Esq.*, for the petitioner.

Clay C. Holmes, Esq., and *James E. Markham, Jr., Esq.*, for the respondent.

Opinion

MURDOCK, *Judge:*

* * * * * * * *

War Facility Amortization.

The petitioner acquired, dissolved, and, after June 30, 1944, carried on the business of the American Bearing Corporation. American Bearing had filed applications for certificates of necessity to cover the cost of constructing facilities for the purpose of producing war products. Certificates of necessity respecting those facilities were issued pursuant to section 124 of the Internal Revenue Code, stating that the facilities "are necessary in the interest of national defense during the emergency period, up to 50% [in some 35%] of the cost." The facilities were constructed. The purpose of the certificates was to permit the petitioner to amortize the cost of the additional facilities over a period of 60 months rather than recover their cost through depreciation deductions over the normal useful lives of the facilities. The petitioner claimed accelerated

depreciation for the entire cost of the facilities, but the Commissioner limited the accelerated amortization to the percentages fixed in the certificates of necessity. The petitioner contends that the percentage limitations which the certifying authorities purported to impose must be ignored because they are in violation of the words of and the intention of Congress behind section 124.

Section 124 (a) provides that every person, at his election, shall be entitled to a deduction with respect to the amortization of the adjusted basis of any emergency facility based upon a period of 60 months. Subsection (e) defines emergency facility as "any facility, land, building, machinery, or equipment, or part thereof, the construction, reconstruction, erection, installation, or acquisition of which was completed after December 31 1939, and with respect to which a certificate under subsection (f) has been made." Section 124 (f) (1) provides that in determining the adjusted basis of an emergency facility "there shall be included only so much of the amount otherwise constituting such adjusted basis as is properly attributable to such construction, reconstruction, erection, installation, or acquisition after December 31, 1939, as either the Secretary of War or the Secretary of the Navy has certified as necessary in the interest of national defense during the emergency period" under regulations prescribed by the certifying authority with the approval of the President. The certificates in question were for construction after December 31 1939, and it is conceded that the adjusted basis of that construction is cost.

The petitioner contends that the words "only so much of the" cost refer to construction after Decem-

ber 31, 1939, and that the provision may not be read "the cost attributable to so much of such construction as the certifying authority has certified as necessary in the interest of national defense during the emergency period." It says the certifying authority was to certify facilities, not costs.

The United States Graphite Company sought to compel the certifying authorities to issue certificates which would cover all rather than only part of the cost of facilities which it had constructed. The District Court for the District of Columbia dismissed the complaint. *United States Graphite Co.* v. *Harriman*, 71 F. Supp. 944. The Court of Appeals for the District of Columbia affirmed per curiam without opinion, but Judge Wilbur K. Miller filed a dissent in which he discussed the problem. *United States Graphite Co.* v. *Sawyer*, 176 F. 2d 868, certiorari denied 339 U.S. 904. That taxpayer then sued on a claim for refund of taxes in the Court of Claims on the ground that the percentage of cost limitation on its certificates should be ignored. The Court of Claims held for the taxpayer, and the Government did not seek a writ of certiorari. *Wickes Corp.* v. *United States*, 108 F. Supp. 616.[2]

Judge Miller, in his dissenting opinion referred to above, considered and discussed the words used by Congress, the purpose which it sought to accomplish, and the legislative history of section 124. He stated, "After exhaustive study, I have been able to discover nothing in the language of the Act, or in its legisla-

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[2] The Wickes Corporation was the successor to the United States Graphite Company. The cases also involved another issue which is not in the present case.

tive history, to indicate that Congress intended to give the certifying agency the right to determine that only a portion of the cost of a necessary facility could be amortized." His interpretation of section 124 (f) (1) was that it meant "there shall be included as amortizable cost only so much of the cost of the facility as is properly attributable to the part of it which was constructed after December 31, 1939, and which has been certified as necessary in the interest of national defense." The Court of Claims came to the same conclusion. This Court believes that the reasoning of Judge Miller in his dissenting opinion and of the Court of Claims is sound and that a correct interpretation of the provisions of section 124 entitles the petitioner in this case to amortize the full cost of the facilities certified over the accelerated period.

Reviewed by the Court.

Decision will be entered under Rule 50.

OPPER, *J.*, dissents on the last issue on the authority of *United States Graphite Co.* v. *Sawyer,* (C.A., D.C. Cir.) 176 F. 2d 868, certiorari denied 339 U.S. 904; and in consonance with the dissenting opinion of Chief Judge Jones in *Ohio Power Co.* v. *United States,* (Ct. Cl., Mar. 1, 1955) — F. Supp. —.